Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

No. 91-723

In the Supreme Court of the United States

OCTOBER TERM, 1991

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND WAYNE A. GILBERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

The National Labor Relations Board found that District 91 unlawfully denied a union member recall to his position as an elected union representative in retaliation for his having engaged in activity protected by Section 7 of the National Labor Relations Act, and that the Unions thereafter deprived him of the right to run as a candidate in a future union election.

The question presented is whether the Board reasonably exercised its discretion to remedy those unfair labor practices by ordering the Unions to restore the member to his status as an incumbent union representative for a period of time at least equal to the time remaining in the term for which he was unlawfully denied recall, and to reimburse him for any loss in wages or benefits until he is permitted to participate in an election for that position as an incumbent, after he has served his term.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	12
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Abbey's Transportation Service, Inc. v. *NLRB*, 837 F.2d 575 (2d Cir. 1988)	6
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)	16-17
Emhart Indus., Hartford Div. v. *NLRB*, 907 F.2d 372 (2d Cir. 1990)	11
Finnegan v. *Leu*, 456 U.S. 431 (1982)	14
Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973)	13
Leeds & Northrup Co. v. *NLRB*, 391 F.2d 874 (3d Cir. 1968)	17
Local Lodge No. 707 (Pratt & Whitney Div. Of United Technologies Corp.), 276 N.L.R.B. 985 (1985)	4
Machinists, Local Lodge 707, 278 N.L.R.B. 39 (1986), enforced, 817 F.2d 235 (2d Cir. 1987)	4
National Maritime Union v. *NLRB*, 423 F.2d 625 (2d Cir. 1970)	6
NLRB v. *Financial Institution Employees, Local 1182*, 475 U.S. 192 (1986)	16
NLRB v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968)	6
NLRB v. *Local 707, Int'l Ass'n of Machinists*, 817 F.2d 235 (2d Cir. 1987)	7
NLRB v. *Local 294, International Brotherhood of Teamsters*, 470 F.2d 57 (2d Cir. 1972)	7
NLRB v. *Operating Engineers, Local 825*, 420 F.2d 961 (3d Cir. 1970)	7

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Cases—Continued: Page

NLRB v. *Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.), cert. denied, 304 U.S. 576 (1938) 17
NLRB v. *Schrivener*, 405 U.S. 117 (1972) 6
NLRB v. *Swinerton*, 202 F.2d 511 (9th Cir.), cert. denied, 346 U.S. 814 (1953) 17
Olivetti Office USA, Inc. v. *NLRB*, 926 F.2d 181 (2d Cir. 1991) 12
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 13
Sheet Metal Workers v. *Lynn*, 488 U.S. 347 (1989) 14
Southern S.S. Co. v. *NLRB*, 316 U.S. 31 (1942) 15
Sure Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 15

Statutes:

Labor-Management Reporting and Disclosure Act, Tit. IV, 29 U.S.C. 483 ..... 15, 16
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 ..... 6, 7, 15
§ 8(a)(1), 29 U.S.C. 158(a)(1) 6
§ 8(a)(3), 29 U.S.C. 158(a)(3) 6
§ 8(a)(4), 29 U.S.C. 158(a)(4) 6
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 4, 6, 7

ON IS NOT CONTINUOUS.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 934 F.2d 1288. The decision and order of the National Labor Relations Board (Pet. App. 30a-36a), including the recommended order of the Administrative Law Judge (Pet. App. 37a-255a), is reported at 298 N.L.R.B. No. 47. The Board's supplemental decision (Pet. App. 26a-29a) is unreported.

JURISDICTION

The opinion of the court of appeals was issued on June 4, 1991. A petition for rehearing was denied on August 6, 1991. Pet. App. 256a. The petition for a writ of certiorari was filed on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner District Lodge 91 (District 91) is a delegate body affiliated with the International Association of Machinists and Aerospace Workers (the International). Petitioner Local Lodge No. 707 (Local 707) is one of five affiliated locals of District 91; it represents employees at the North Haven, Connecticut plant of Pratt & Whitney, a division of United Technologies Corporation. The locals are represented at District 91 by elected delegates from each of the affiliated locals. Pet. App. 43a.

District 91 employs a number of full-time, salaried labor representatives to assist the locals in such matters as organizing, steward education, and leaflet distribution. The labor representatives are elected to four-year terms. Each local may nominate one candidate for each of the open labor representative positions. After the candidates are nominated, the membership of the local votes on which of the nominees to endorse. The names of the endorsed candidates appear on a District-wide ballot; the candidates receiving the highest number of votes are elected. Pet. App. 45a.

Respondent Wayne Gilbert was employed at Pratt & Whitney's North Haven facility until he was dis-

charged on July 1, 1982.[1] Gilbert was president of Local 707 from 1979 until July 31, 1982, when he resigned to begin serving as a District 91 labor representative. Pet. App. 44a. Robert Fleeting, Peter Tinella, and six incumbents were elected as labor representatives in the same election; because they commenced serving their terms earlier, Gilbert and Fleeting were assigned greater seniority than Tinella. Pet. App. 45a, 135a-138a. In April 1983, the International notified District 91 that, as of July 1, it would be unable to fund three of District 91's nine labor representative positions. Accordingly, Gilbert, Fleeting and Tinella were laid off on June 3 "in accordance with seniority," because they were junior to the other six labor representatives. Pet. App. 139a-146a.[2]

b. In December 1983, Gilbert and two other Local 707 members prepared and distributed a leaflet that criticized the incumbent leaders of Local 707, charging them with embezzlement, criminal activity, and

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[1] Local 707 filed a grievance over Gilbert's discharge. On September 7, 1983, Gilbert won the arbitration on his discharge claim and was awarded reinstatement and backpay. On September 14, Pratt & Whitney informed Local 707 that, because of a recent layoff, it could not reinstate Gilbert but would place him on "leave of absence" status. Local 707 thereafter brought suit to enforce the arbitrator's decision. Pet. App. 48a-49a. On February 5, 1986, the suit was settled. Under the terms of the settlement, Gilbert received an award of backpay but agreed to forgo reinstatement. Pet. App. 201a-204a.

[2] On June 3, 1983, Gilbert tendered his resignation as labor representative contingent on his being selected to fill a safety representative position at Pratt & Whitney. Pet. App. 150a-152a, 168a-171a. But Pratt & Whitney rejected Gilbert's designation as safety representative because he was not an "active" employee. Pet. App. 168a.

discriminatory treatment of Gilbert and others. On January 15, 1984, Local 707 and the International filed intraunion charges against Gilbert and his supporters; in response Gilbert filed unfair labor practice charges against Local 707 and the International, alleging that the Unions had violated the National Labor Relations Act by proceeding against him for engaging in protected activity. Pet. App. 51a-56a.[3]

On August 19, 1984, Local 707 cancelled Gilbert's membership, retroactive to May 1984. On September 16, Local 707 declared Gilbert ineligible to run for any elective union office; on October 5, the International approved this ruling. Gilbert then filed additional unfair labor practice charges against Local 707, District 91 and the International, alleging that, by cancelling his union membership in retaliation for his protected intraunion activities, the Unions had violated Section 8(b)(1)(A) of the Act. Pet. App. 56a-57a.[4]

c. On December 7, 1984, Local 707 filed a state court action asking that Gilbert be enjoined from entering the Local 707 union hall, attending union meetings, and "harassing" or "intimidating" union members; the suit requested damages in the amount of $15,000. Pet. App. 77a-78a, 86a-87a. The state

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[3] On September 30, 1985, the Board found that Local 707 and the International had violated Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by filing and processing internal union charges against Gilbert because of his involvement in preparing and distributing the leaflets. *Local Lodge No. 707 (Pratt & Whitney Div. of United Technologies Corp.)*, 276 N.L.R.B. 985 (1985) (*Gilbert I*).

[4] On January 16, 1986, the Board issued its decision finding the violation charged. *Machinists, Local Lodge 707*, 278 N.L.R.B. 39 (1986), enforced, 817 F.2d 235 (2d Cir. 1987) (*Gilbert II*).

court dismissed the complaint, finding that Gilbert's alleged wrongful conduct did not "even approach the kind of conduct" described in cases relied upon by Local 707. Pet. App. 33a.

On March 11, 1985, District 91 announced at an executive board meeting that one labor representative position had become available and that Tinella was being recalled to fill that position. When an executive board member asked why Tinella was being recalled instead of Gilbert, who had greater staff seniority, it was explained that Gilbert was not being considered for the position because he had previously resigned as labor representative. Pet. App. 183a-184a. Gilbert promptly sent letters to District 91 denying he had resigned and asking to be recalled. Pet. App. 190a-191a. In a letter to Gilbert dated April 9, the District 91 director insisted that Gilbert had resigned and reminded Gilbert that his union membership had "lapsed effective June 30, 1984." Pet. App. 191a-192a.

On February 7, 1986, several days after Gilbert settled his discharge arbitration suit by agreeing to waive reinstatement to his job at Pratt & Whitney (see note 1, *supra*), an International representative informed a District 91 official that Gilbert's nomination for labor representative would be a violation of the District 91 bylaws, because Gilbert was not then "actively employed" by Pratt & Whitney. Pet. App. 211a. When members subsequently attempted to nominate Gilbert for the labor representative position, District 91 officials ruled that Gilbert was ineligible. Pet. App. 213a-216a, 225a-229a. In a letter to Gilbert dated February 20, 1986, the president of Local 707 stated that Gilbert was ineligible to run for labor representative because he was not "actively employed in one (1) of the shops coming under the jurisdiction

of this District or * * * by the District or one (1) of the Local Lodges affiliated with this District for a period of at least one (1) year prior to nomination." Pet. App. 232a.

2. The Board, in agreement with the ALJ, found that Local 707 violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by filing a lawsuit without any reasonable basis against Gilbert because he engaged in protected activities. Pet. App. 32a-36a. To remedy this violation, the Board ordered Local 707 to reimburse Gilbert for all legal expenses incurred in his defense of the lawsuit. Pet. App. 254a-255a.

The Board also found, in agreement with the ALJ, that District 91, in its capacity as Gilbert's employer, violated Section 8(a)(1), (3), and (4) of the Act, 29 U.S.C. 158(a)(1), (3), and (4), by refusing to recall Gilbert to a district labor representative position on and after March 11, 1985, because he engaged in protected activities.[5] Pet. App. 32a n.2, 196a. In

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[5] Section 7 of the Act, 29 U.S.C. 157, encompasses the right of an employee to participate in union affairs by, *inter alia*, opposing the incumbent leadership and its policies. *National Maritime Union* v. *NLRB*, 423 F.2d 625, 626 (2d Cir. 1970) (employees' rights under Section 7 include right to engage in intraunion activity in opposition to incumbent administration). In addition, an employee has the right under Section 7 to file unfair labor practice charges with the Board and resort to Board processes. See *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 421-422 (1968). A union-employer, therefore, violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), if it retaliates against an employee for engaging in such protected activities. See *National Maritime Union* v. *NLRB*, 423 F.2d at 626; *Abbey's Transportation Services, Inc.* v. *NLRB*, 837 F.2d 575, 579-582 (2d Cir. 1988). And it violates Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), if it retaliates against an employee for filing charges with, or giving testimony before, the Board. See *NLRB* v. *Scrivener*, 405 U.S. 117, 124-125 (1972).

so finding, the ALJ rejected, as pretextual, District 91's reliance on Gilbert's contingent resignation in order to be eligible for the safety representative position. Pet. App. 194a-196a. The Board further found, in agreement with the ALJ, that District 91 and Local 707, in their capacity as unions, violated Section 8 (b) (1) (A) of the Act by refusing to allow Gilbert to be nominated as a candidate for District 91 labor representative because he engaged in protected activities.[6] The Board rejected the contention that Gilbert was not eligible to run in that election because he was not working at the trade. The Board noted that, had District 91 not unlawfully refused to recall him to that position in 1985, he would have been eligible to run as an incumbent. Pet. App. 32a n.2, 235a-244a.

To remedy these violations, the Board ordered District 91 to restore to Gilbert, to the extent possible, all benefits, rights, and privileges of district labor representative status. The order directs that Gilbert be re-

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[6] Section 8(b) (1) (A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7 rights, including the right to engage in union activity and to file charges with the Board. A union, therefore, violates Section 8(b) (1) (A) of the Act when it disciplines a member in retaliation for exercising these rights. *NLRB* v. *Local 707, Int'l Ass'n of Machinists*, 817 F.2d 235, 237 (2d Cir. 1987) (cancelling member's union membership because he engaged in internal union activities and pressed Board charges violates the Act); *NLRB* v. *Local 294, International Brotherhood of Teamsters*, 470 F.2d 57, 63 (2d Cir. 1972) (fining and suspending union member because he pressed Board charges violates the Act); *NLRB* v. *Operating Engineers, Local 825*, 420 F.2d 961, 961 (3d Cir. 1970) (union's expulsion of member for invoking Board processes violates the Act).

instated as a District 91 labor representative for a period of time equivalent to the remainder of the term for which he was unlawfully denied recall—some 13 months—in order to restore his status as an incumbent. The order further requires that, after Gilbert has served that period of incumbency, District 91 and Local 707 shall permit him to run as an incumbent candidate for election to a District 91 labor representative position. Pet. App. 28a, 253a. The Board noted (*id.* at 28a) that "this remedy is designed to put Gilbert in the position he would have enjoyed had he not been unlawfully refused recall without impairing the rights of other duly elected labor representatives and Union members." Finally, the Board's order requires Local 707 and District 91 to make Gilbert whole for any loss in wages or benefits he may have suffered from March 1985 until such time as the Unions allow him lawfully to participate in the election for labor representative as an incumbent candidate.[7] Pet. App. 28a, 252a-255a.

On March 5, 1990, District 91 and Local 707 filed a motion with the Board to reopen the record to introduce evidence that Gilbert "ha[d] run in several internal District 91 elections and ha[d] failed to receive enough support to be placed on the ballot in such elections." Pet. App. 31a n.1. The Board denied the motion because the alleged events occurred after the close of the hearing. However, the Board noted that, because the contentions related to the appropriateness of the Board's remedy, they could be raised at the compliance stage of the Board's proceedings. *Ibid.*

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[7] The order provided the option of tolling backpay liability by holding a special rerun election. Pet. App. 29a n.3.

3. The court of appeals upheld the Board's decision and enforced its order "in its entirety." [8] Pet. App. 3a. The court found "sufficient evidence to support the Board's conclusion that the recall to the Labor Representative position should have been made on the basis of seniority, and that District 91 denied Gilbert his right to recall in retaliation for his protected activities." Pet. App. 15a. The court rejected the contention that Gilbert was disqualified from running for a Labor Representative position in 1986. The court agreed with the Board that, as an incumbent representative, Gilbert would have had the necessary qualifications and that the reason he was not an incumbent was because of District 91's and Local 707's earlier retaliation against him. Pet. App. 16a. The court concluded that "[i]t would undermine the purposes of the Act if a union could use, with impunity, its earlier retaliatory acts to engage in future retaliation by what would otherwise appear to be lawful conduct. The unions had an arguable basis for finding that Gilbert was ineligible, but that makes no difference if the unions' true motive was retaliation and its illegal prior action based upon that motive was the cause of the ineligibility." Pet. App. 17a.

The court also rejected petitioners' challenge to the Board's remedial order. The court disagreed with petitioner's contention that the Board's order was "speculative" and "punitive" because there was no conclusive proof that Gilbert would have been reelected in 1986, and again in 1990, had he been able

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[8] Before the court of appeals, Local 707 did not challenge the Board's finding that it had unlawfully filed the state court proceeding in retaliation for Gilbert's dissident activities, or the Board's remedy for the violation. Pet. App. 10a.

to run as an incumbent. Pet. App. 18a.[9] The court noted the backpay remedy is appropriate if supported by "sufficient relevant factual information before the Board making it reasonable for it to assume that Gilbert would have been re-elected." Pet. App. 19a. The court observed that seven out of eight incumbents were reelected in 1986; Gilbert was nominated to run in 1986 at meetings of Local 707 and Local 700; and he would have had the advantage of incumbency absent the retaliatory treatment. *Ibid.*

The court further noted that petitioners' objections to the Board's order reinstating Gilbert as an incumbent candidate were premised on "their contention that it was irrelevant in the 1990 election that Gilbert was not running as an incumbent." Pet. App. 20a.[10] The court stated that, given the nature of the position in which "Labor Representatives are regularly before members in a variety of situations in which the Representative is able to represent and fight for employee rights," as well as the fact that historically incumbents overwhelmingly win reelection, "the Board could properly assume that significant advantages attach to incumbency." Pet. App. 21a. The court concluded that the Board's remedy "both makes Gilbert whole for the loss he suffered and guards against rewarding the unions for their misconduct." *Ibid.*

The court rejected petitioners' argument that the Board's reinstatement remedy "intrudes upon the primary jurisdiction of the Secretary of Labor * * *

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[9] Labor representatives serve for a four-year term. The Unions argued that, had Gilbert been recalled in 1985, his term would have expired in 1986.

[10] Gilbert was allowed to participate in the 1990 election of labor representatives and lost. Pet. App. 20a.

under Title IV of the [Labor Management Reporting and Disclosure Act], 29 U.S.C. §§ 481-483, the statute that specifically regulates the conduct of elections for union officers." Pet. App. 21a. The court pointed out that the Board's order "does not challenge an election that was already conducted, but merely requires that Gilbert be given an opportunity to 'run for the next scheduled election' after he has been properly reinstated." Pet. App. 22a. The court further noted that the order does not require a rerun election or that any incumbent be displaced to make way for Gilbert. Accordingly, the court concluded (Pet. App. 22a-23a):

> Rather than unlawfully interfere with union elections, the order merely requires that the unions give Gilbert the rights he had under the unions' constitution and bylaws but was deprived of by their unlawful retaliation. The remedy therefore falls squarely within the exception to Title IV exclusivity, which states that "[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter." [29 U.S.C.] 483; cf. *Calhoon* [v. *Harvey*], 379 U.S. at 139-41 (exclusivity of Title IV applies to challenges to a union's eligibility requirements for candidates for office but not to the union's discriminatory application of those requirements).

Finally, the court rejected the argument that the delay between issuance of the ALJ's and the Board's decisions "undermine[d] the union membership's right to choose their own representatives." Pet. App. 23a. Distinguishing its decisions in *Emhart, Indus., Hartford Div.* v. *NLRB*, 907 F.2d 372 (1990), and

Olivetti Office USA, Inc. v. *NLRB*, 926 F.2d 181 (1991), in which it had found that changed circumstances rendered the Board's orders inappropriate, the court of appeals acknowledged that the present union membership did not select Gilbert as their representative. The court noted, however, that in this case "the union's members in 1985 were deprived of his services for 13 months by District 91's unlawful conduct [and] [e]nforcing the order here also serves the salutory purpose of making Gilbert whole[.]" Pet. App. 24a.

ARGUMENT

Petitioners no longer challenge the Board's unfair labor practice findings. And petitioners concede that "the Board properly ordered District 91 to compensate Gilbert for the pay and benefits he lost during [the] thirteen-month period of time as a remedy for [District 91's failure to reinstate Gilbert in 1985 to his elected position as labor representative.]" Pet. 17-18. Petitioners also concede that the Board properly could have ordered District 91 and Local 707 to "permit[] Gilbert to be nominated and, if endorsed, run for election" to remedy the unlawful refusal to permit him to run for a labor representative position in 1986. Pet. 16 n.9. Petitioners contend, however, that the court of appeals improperly upheld the Board's grant to Gilbert of additional backpay and reestablishment of incumbency status as a labor representative. There is no merit to that contention. The Board's order simply reestablishes the status quo ante to the extent possible in the circumstances here. The court of appeals' decision upholding the Board's order is consistent with the decisions of this Court and other courts of appeals. Accordingly, no further review is warranted.

1. To make employees whole, the Board properly seeks to restore the parties, to the extent practicable, to the situation that would have existed but for the employer's unfair labor practices. *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 188-189 (1973); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (141). Here, the Board ordered District 91 to let Gilbert serve as a labor representative for some 13 months—the period of incumbency he was deprived of in 1985 and 1986—and then permit him to participate in an election for that position as an incumbent. Absent petitioners' unlawful conduct, Gilbert would have presented himself to the electorate in February 1986 as an incumbent labor representative who had served the members' interests during the past 13 months. The Board's incumbency requirement restores the status quo ante by assuring that Gilbert has a level playing field for his reelection efforts. As the Board explained (Pet. App. 29a), the incumbency feature of its remedy is "aimed at removing [Gilbert's] handicap to the extent practicable in this legal context." Since Gilbert had been out of office for more than four years when the ALJ's recommended decision and order issued, a remedy that merely ordered petitioners to allow Gilbert to stand for office at the next election plainly would not reestablish the status quo ante.

Petitioners, relying on the results of the 1990 labor representative election which Gilbert lost, assert (Pet. 8-13) that the Board's reinstatement order conflicts with congressional policy, expressed in the Labor-Management Reporting and Disclosure Act (LMRDA), "that union members be free to select their own representatives through elections." Peti-

tioners simply ignore the fact that it was *they* who frustrated the union members' rights to freely elect their representatives by refusing duly to recall Gilbert to office and precluding him from running again when duly nominated. As the court of appeals noted (Pet. App. 22a), the Board's order simply gives Gilbert the right to stand for office established in petitioners' constitutions and by-laws which Gilbert "was deprived of by [petitioners'] unlawful retaliation." Accordingly, the Board's reinstatement order vindicates the members' rights freely to choose their own representatives.

Petitioners' contention (Pet. 9-10) that the Board's order conflicts with *Finnegan* v. *Leu*, 456 U.S. 431 (1982), and *Sheet Metal Workers* v. *Lynn*, 488 U.S. 347 (1989), is without merit. In *Finnegan* v. *Leu*, *supra*, the Court held that the LMRDA does not preclude union officials from discharging employees who hold *appointive* positions whose views conflict with those of the union leadership. Petitioners do not contend here, as they did in the court of appeals (C.A. Br. 23-26), that Gilbert's position was appointive. And the Board's position is consistent with *Sheet Metal Workers* v. *Lynn*, in which the Court held that the "retaliatory removal" of an *elected* union official violates the LMRDA. 488 U.S. at 355. As the Court noted in *Lynn*, the purpose of the LMRDA was to assure that "union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Ibid.* The Court further observed that the discharge of an elected official chills not only that official's exercise of free speech rights, but the rights of "members who voted for him." The Board's order does not require petitioners to displace any elected officials; on the contrary, it merely restores an elected

official who was unlawfully removed to his former position for the remainder of his term.[11]

2. Petitioners' additional contention (Pet. 13-17) that the Board's order improperly "intrudes into internal union affairs" by regulating union election procedures is equally without merit. As the court of appeals correctly noted (Pet. App. 22a), "even if the unions' retaliation against Gilbert involves internal union affairs, it is nonetheless clear that the [National Labor Relations] Act unambiguously regulates the conduct at issue in this case. The reinstatement component of the Board's order is a remedy for the unions' conduct that violated the Act, indicating that the Board has the authority to grant such a remedy." District 91, as Gilbert's employer, unlawfully refused to recall him to his position as labor representative in retaliation for engaging in activity protected by Section 7 of the Act. Reinstatement is the traditional remedy for such a violation of the Act.

Nor is the Board's order inconsistent with Title IV of LMRDA, which provides the exclusive means of redress "for challenging an election already conducted." 29 U.S.C. 483. As the court of appeals noted (Pet. App. 22a), the Board's order does not challenge the 1990 election which has been conducted,

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[11] Nothing in *Sure Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), or *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942), remotely supports petitioners' argument under the LMRDA. In *Sure-Tan*, the Court held that the Board could properly find that an employer engaged in an unfair labor practice by reporting employees known to be undocumented aliens to the INS in retaliation for their engaging in union activity. In *Southern S.S. Co.*, which was decided 15 years before Congress enacted the LMRDA, the Court held that when seamen are discharged for acts of mutiny aboard ship in violation of federal criminal laws, the Board may not order their reinstatement.

direct any rerun election, or require the dismissal of any elected official. All it requires is that Gilbert be reinstated to the position from which he was unlawfully removed by District 91, and that District 91 and the Union thereafter allow him to compete for office. The Board's order "therefore falls squarely within the exception to Title IV exclusivity, which states that '[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter.' " Pet. App. 22a-23a (citing 29 U.S.C. 483).[12]

3. Petitioners also object (Pet. 18-19) to the Board's backpay remedy insofar as it awards Gilbert backpay beyond the 13 months of his elected term; that is, until he has been allowed to participate in an election for labor representative after restoration of his period of incumbency. The Board's award is premised on the determination that, as a direct result of petitioners' unlawful conduct in February 1985, Gilbert lost the opportunity to be reelected to another four-year term. Although there is no certainty that Gilbert would have been reelected had he run as an incumbent, the Board was entitled to resolve any doubts against petitioners as the wrongdoers who are responsible for the uncertainty. See *Bigelow* v. *RKO*

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[12] Petitioners' reliance (Pet. 14) on *NLRB* v. *Financial Institution Employees, Local 1182*, 475 U.S. 192 (1986), is misplaced. There, the Court held that the Board had no authority to require a union to allow non-members to vote in an affiliation election in the absence of a question of representation. Nothing in *Financial Institution Employees*, or in the other cases cited by petitioners, suggests that the Board may not order a union-employer to reinstate an employee to a position from which he has been unlawfully terminated.

Radio Pictures, Inc., 327 U.S. 251, 265 (1946) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"). Far from being outside the Board's "special competence or authority" (Pet. 19), that principle is a commonplace in Board remedies. See, *e.g.*, *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.) ("[I]t rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune."), cert. denied, 304 U.S. 576 (1938); *Leeds & Northrup Co.* v. *NLRB*, 391 F.2d 874, 880 (3d Cir. 1968) (where there was uncertainty whether union would have been able to resist employer's demand to decrease employees' share of profits, had the employer not unlawfully refused to bargain, "the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act"); *NLRB* v. *Swinerton*, 202 F.2d 511, 516 (9th Cir.), cert. denied, 346 U.S. 814 (1953) (if an unfair labor practice is at least a partial cause of the loss suffered by the wronged party, the burden is on the party that committed the unfair labor practice "to disentangle the consequences for which it was chargeable from those from which it was immune"). Here, as the court of appeals noted (Pet. App. 21a), the advantages of incumbency were well documented by the fact that six out of eight incumbents won in 1982 and seven out of eight won in 1986.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 48244